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IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

LOUIS SANZO,

Petitioner,

-v-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the government's negligent use of false testimony denied Sanzo due process of law and requires that he be granted a new trial.

2. Whether the admission into evidence of testimony relating to organized crime denied Sanzo a fair trial.

3. Whether the evidence of conspiracy to defraud the United States of tax revenues which consisted solely of evidence of concealment was sufficient to support the conviction.

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OPINION BELOW

The opinion of the Second Circuit affirming the judgment of conviction (Costantino, J.) is set forth in the appendix at (1a).[1]

JURISDICTION

The order denying Sanzo's timely petition for rehearing was denied on May 5, 1982. This petition is timely filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

[1]References to the appendix are designated "a".

CONSTITUTIONAL PROVISION INVOLVED

This case involves the due process clause of the Fifth Amendment to the United States Constitution. (15a)

PROCEDURAL HISTORY

Louis Sanzo was convicted after a trial by jury of two counts of income tax evasion, 26 U.S.C. §7201 and one count of conspiracy to defraud the government in the collection of income taxes, 18 U.S.C. §371. On August 14, 1981, he was sentenced to serve three years incarceration on each count to be served concurrently and a fine of $7,500 on each count.

On March 10, 1982, the Second Circuit affirmed the judgment of conviction.

On May 5, 1982, the Second Circuit denied Sanzo's petition for rehearing with a suggestion for rehearing en banc.

INTRODUCTORY STATEMENT

This case requires review by this Court. The first issue raised presents an issue of apparent first impression; namely, whether the negligent use by the government of false testimony violates due process. The Second Circuit rejected the negligent use standard without citing any case law and disregarded the only case before it which spoke to the issue. There are good reasons for adopting this standard where, as here, the government is in possession of evidence which clearly indicates the falsity of its witnesses' testimony at or before the time it is given.

The second issue raised involves the propriety of the government placing into evidence testimony indicating links between Sanzo and a Sam Cavalieri. The clear and unmistakable import of this testimony was that Cavalieri

was a member of organized crime, yet, the government offered no proof of who Cavalieri was nor of his role in any organized crime group. In fact, on appeal, the government took the position that Sam Cavalieri could have been anyone (even a "jazz musician"). The record is totally at odds with the government's position. This testimony could only have led the jury to believe that Sanzo was linked to organized crime. While proof of this link would have been appropriate at trial, it was not proper to accomplish such a result by innuendo in the absence of any effort by the government to prove who Sam Cavalieri was.

The last issue raised involves the correctness of the Second Circuit's finding that the evidence of the conspiracy was sufficient. The evidence at trial showed only that Sanzo concealed his unreported income and that the contractor involved concealed the payment of that income. There was no proof of any agreement to do this. The decision of the Second Circuit flies in the face of a line of decisions by this Court holding that acts of covering up cannot themselves constitute proof that the concealment was part of the original agreement. *Grunewald v. United States*, 353 U.S. 391, 402 (1957).

STATEMENT OF FACTS

The Government's Case

The government's case can be briefly summarized as an effort to show that Louis Sanzo, the president of Local 29 of the Drillrunners and Blaster's Union, accepted payments, in violation of the Taft-Hartley Act, and thereby conducted the affairs of the Union through a pattern of racketeering. These payments were made by two employers, Aberdeen and RNT Associates, through their president, Ralph N. Trainello.

The government further attempted to show as predicate acts, under the RICO counts, that Sanzo accepted a $500.00 bribe to let non-union men on a job site and that he had embezzled $291.00 from the Pension and Welfare Fund to purchase an air-conditioning unit for his mother.

Louis Sanzo had known Joseph Cippolone and Ralph Trainello for a number of years. In 1968, Joseph Cippolone and others became partners in a construction firm, Aberdeen Associates (131).[1]

In the early 1970's, Joseph Cippolone and a few others wished to terminate their ownership of Aberdeen. In seeking a way to achieve this, Cippolone asked Louis Sanzo if he knew an attorney who could handle the matter. Sanzo referred Cippolone to Ralph Trainello (131-132). Instead of arranging to have Cippolone and his group bought out, Trainello suggested that Cippolone's group buy out the other partners and that Trainello would become a partner. This was accomplished, and Trainello, Cippolone, his brother John Cippolone, and Joseph Cappogrosso became the owners of Aberdeen (133-134).

Soon after this buy-out, Aberdeen's business increased greatly and it became a lucrative enterprise. As will happen, some problems arose between the partners. In 1974, Cappogrosso, in looking at the Aberdeen check books, noticed a large number of checks made out to Trainello for items which Cappogrosso did not feel related to the business. Cappogrosso spoke to Joseph Cippolone, who in turn spoke to Trainello. Trainello's reaction was angry and as a result Cappogrosso was bought out (150-152).

In 1977, problems arose between the Cippolones and Trainello and it was agreed that Aberdeen would be closed

[1]References are to the minutes of trial.

and that Trainello would pay approximately $50,000 to Joseph Cippolone, his brother, and sisters (539-541).

Trainello remained in the construction business by opening RNT Associates, while Joseph Cippolone and Frank Panico opened Cipico (541-542). Cippolone also was involved with Louis Sanzo's wife, Bertha, in two other companies; Berth-Ange Realty, which owned a building and rented space to Cipico, and Jo-Lo Leasing, which bought construction equipment and leased it to Cipico (542-546).

Aberdeen, RNT Associates, and Cipico, all, at one time or another, used a few men from Local 29, but generally they did not do blasting work and there was no need for many Local 29 men (679-680). Joseph Cippolone testified that all the Local 29 jobs were done by Local 29 men[3] and further that he had no information that any of the Local 29 men had not received their proper pay and welfare and pension payments (680-683).

Beginning in 1974 up until 1977, Trainello wrote a large number of checks to the Aberdeen account which were made out to cash and were cashed by various people. Trainello continued this practice at RNT until the end of 1977.

The government called a number of witnesses who testified that they cashed Aberdeen and RNT checks and gave the proceeds to Sanzo. Proof was also presented that these payments were carried on the Aberdeen and RNT books as various equipment and other business expenses.

Albert Moschella testified that in 1974, he cashed three Aberdeen checks made payable to cash and signed by Trainello, totalling $45,000 and gave approximately $32,000 of it to Sanzo. The rest was kept for Moschella's expenses in attempting to win a construction contract to build a church (214-224).

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[3]Cappogrosso verified this (159).

Joseph Bastogne testified that in February 1975, he cashed an Aberdeen check for $1,000 and gave the money to Sanzo, who told him that he did not want his wife to know of this money (297-299). On cross-examination, Bastogne's recollection of the events became quite hazy (301, 303, 305).

In May, 1977, Rose De Biasi cashed a $5,000 Aberdeen check for Trainello (433-435). Trainello testified that he gave this money to Sanzo and had obtained a receipt for it. (1029-1030). However, when asked about a series of checks made out to cash, Trainello stated that most of the money had gone to Joseph Cippolone (1030). Trainello stated that he had paid Sanzo $200,000 because of threats against his life, but he could not state which checks were used to do so (1032-1033, 1034). Trainello's testimony was attacked by the government on re-direct (1040-1041).[4]

It was also brought out that Sanzo had placed a mortgage on his home to obtain some $17,000 to lend to Aberdeen as "start-up money" (1035) and that in attempting to pay part of this money back, Trainello wrote out a check on his personal special account. Later, he told Sanzo he could not cash this check because there were insufficient funds in his account (1035-1036).

Anna Stamulis testified that in 1976 she worked in the Claims Department of Local 29 and as an assistant administrator (317). In May of 1976, Sanzo asked her to cash a check for $5,000 drawn on Aberdeen (319). Stamulis agreed and deposited the check in her account. When the check cleared, she wrote a check on her account for $5,000 and gave it to Sanzo (321). It was the defense contention that Stamulis cashed this check for Mario Montuoro,

[4] The government correctly took the position that, as to the reason for the payments, Trainello was lying (460). Trainello's position is preposterous. Among other implausibilities, as the government pointed out, no one signs a receipt for cash received under death threats (1052).

another officer of the Union. In attempting to establish this, Stamulis was asked if she had forged dental claims on behalf of Montuoro. She denied this (326).

Mario Montuoro, a Local 29 officer and member, testified that in 1974 he cashed an Aberdeen check for $10,000 and, after keeping a $300.00 fee, gave $9,700 to Sanzo (346-347). It was brought out on cross-examination that Montuoro had led an opposition slate to Sanzo's presidency and had lost overwhelmingly in a government run election (404). Further, a large number of falsities in Montuoro's testimony regarding his role in the Union and his relationship to Sanzo were also brought out.

Joseph Cippolone testified under a promise that he would not be prosecuted for anything about which he truthfully testified (717). Cippolone testified that sometime after October 21, 1977, at a baseball game in which his son was playing, he had agreed to cash an RNT check for $5,000 (548-549). Soon thereafter, Cippolone cashed the check and gave these proceeds to Sanzo (547-549). However, Cippolone gave three different versions of how he gave these proceeds to Sanzo (728-733). Further, it was shown that it was impossible for the agreement to cash the check to have been made at that baseball game, since that league's games ended more than a month before, in September (1406-1407).

John Cippolone testified that in 1977 he cashed a $5,000 RNT check and gave the proceeds to Sanzo (794).

John Pelosi, an attorney who did work for Cipico, testified that in September 1977, Sanzo gave him a $4,000[1] RNT check (776). Pelosi took it, assuming that it was for the Cippolones as part payment of the Aberdeen settlement (777). Sanzo said the check was for him (779). However, when Pelosi gave the money to Sanzo, Sanzo

[1]Pelosi kept $1,500 of the $4,000 as payment for fees owed by Mrs. Sanzo and Joseph Cippolone (789).

said to give the money to Joseph Cippolone (788). Shortly after this conversation, a cash deposit was made into one of Joseph Cippolone's companies (789).

The government also called a number of witnesses who testified regarding the other RICO predicate acts (the $500 bribe and the air conditioner).

Special Investigator, Anthony Villano, testified as to his undercover role in an investigation of Sanzo. Villano, posing as an out of town contractor, contacted Sanzo to assist him in going into business in New York (957-958). Sanzo agreed to advise Villano of the pitfalls of doing business in New York and how to save money on contracting jobs (961, 984-985). Villano had a conversation with Sanzo which was taped. Villano's interpretation of this conversation was that it violated the union contract with regard to letting non-union men work at union jobs. However, Villano's interpretation was based upon a total lack of knowledge of the union contract and the construction trade (990-1000, 1014-1015).

Mario Montuoro, Joyce Cole and Jerry Levine testified about the purchase of an air conditioner for Sanzo's mother using Pension and Welfare funds.

It was also brought out, that Sanzo and the Union had been under investigation for over three years and that the books and records of both the Union and its Pension and Welfare Fund had been subpoened and scrutinized by the government during that period (122-123). Despite the fact that the Pension and Welfare Fund handled many millions of dollars (122-123), the alleged $291.00 embezzlement was the only irregularity in the Union finances about which the government offered evidence.

Defendant's case

Sanzo called as witnesses most of the men of Local 29 who worked for Aberdeen Associates. They testified that they were paid all their wages and welfare and pension benefits (1360-1362, 1373, 1375, 1385). Further, that all Local 29 jobs were filled by Local 29 men, though as to some jobs there were overlapping jurisdiction with the Laborer's Union (1362, 1374, 1489).[4]

The men of Local 29 also testified that their pay, welfare, pension, medical, and vacation benefits, as well as the rate of employment and size of the Union, markedly increased under the leadership of Sanzo (1361, 1376-1377, 1384).

The defense also called Joseph Casales, D.D.S. and his secretary, Elena Occiuto, who testified that certain dental claims, purporting to be for work done by Dr. Casales and claimed by Mario Montuoro, were forgeries and that the claimed work was never performed (1422-1425, 1426-1427).

In concluding its case, the defense called Mrs. Patricia Martin. Mrs. Martin testified that she had received more than half a million dollars taxfree as part of a malpractice settlement (1529). After receiving this money, Mrs. Martin and her husband loaned money to various friends and family members (1529-1530). In late 1973, Mrs. Martin was present when her husband loaned $5,000 cash to Sanzo at Sanzo's house. In the presence of Mrs. Martin, the $5,000 was given by Sanzo to Trainello (1528). She witnessed two other $5,000 loans and transfers to

[4]At trial, the government attempted to show that a possible reason for the payments to Sanzo were to let laborers do Local 29 jobs. Despite the term "laborer", these laborers receive equal or greater pay than Local 29 men. Thus, there was no economic incentive to use them in place of Local 29 men (1487-1488).

Trainello (1528).[7] In the latter part of 1977 or early 1978, this money was returned to Mr. and Mrs. Martin (1529).

REASONS FOR GRANTING THE WRIT

POINT I

THE GOVERNMENT'S NEGLIGENT USE OF FALSE TESTIMONY DENIED SANZO DUE PROCESS AND REQUIRES THAT HE BE GRANTED A NEW TRIAL.

During the trial, the government called, among others, Mario Montuoro, Anne Stamulis, and Joseph Cippolone[8] as witnesses. Sanzo respectfully suggests that parts or all of the above three witnesses' testimony were false. Moreover, the government knew of, should have known of, or negligently used this false testimony. *Imbler v. Craven,* 298 F.Supp. 795 (C.D.Cal. 1970) aff'd 424 F.2d 631 (10th Cir. 1970) cert. den. *California v. Imbler,* 400 U.S. 865; *Welcome v. Vincent,* 418 F.Supp. 1088 (S.D.N.Y. 1976) rev'd on other grounds 549 F.2d 853 (2d Cir. 1977), cert. den. 432 U.S. 911. In light of the use by the government of this false testimony, Sanzo was denied due process and should be granted a new trial.

Mr. Montuoro testified that he cashed an Aberdeen check for Sanzo and gave the proceeds to Sanzo (345-352). Putting aside a large number of inconsistencies in Mon-

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[7]Mrs. Martin was aware of other loans to Sanzo but only from what her husband told her (1528).

[8]It should also be pointed out that the government called Ralph Trainello as a witness and asked him only about whether he made payments to Sanzo, thereby omitting the 99% of Trainello's statements which the government conceded were false.

tuoro's testimony which were for the jury to use in evaluating his testimony, there were still parts of Montuoro's testimony which were false and which the government knew or should have known were false.

On cross-examination[9] Montuoro testified that he signed a dental claim form in blank and gave it to Sanzo. Subsequently, Montuoro received payment of $600.00 on that claim (362). During defendant's case, the dentist who allegedly rendered this treatment and his nurse-secretary both testified that the treatment was never given and that those portions of the claims allegedly filled out by them were forged (1422-1425, 1426-1427).

At the outset of trial, long before Montuoro was called as a witness, the Court was informed that counsel for Sanzo had informed the government, by letter, in February, 1981 of the forgery of those dental claims. Further, the Court was informed that efforts to have Montuoro prosecuted for causing these forgeries were of no avail because the federal government had declined prosecution and had not returned the documents sent to it by the New York County District Attorney's office which had received them from Sanzo's attorney (15-16). Despite this prior notice, Montuoro's testimony about the forms, which is preposterous,[10] went uncorrected.

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[9]It makes no difference for purposes of this argument that some or all of the allegedly false testimony was brought out on cross-examination, e.g. *Taylor v. Lumbard*, 606 F.2d 371 (2d Cir. 1979).

[10]Montuoro gave no explanation of why Sanzo did this for him nor whether there was any prior agreement between them. Montuoro merely stated that he signed the certification on a blank form and, magically, he received $600.00 in return.

So too, Montuoro testified at trial, as he did at other proceedings (e.g. Workmen's Compensation Hearing, NLRB Hearing) that on May 4, 1978 he was denied nomination for Union office and that on May 12, 1978 he was fired from his Union position by Sanzo. Prior to trial, counsel for Sanzo, at the Strike Force Office, listened to all the tapes made during a Nassau County wiretap of Sanzo's phone. In listening to the tapes of May 12, 1978, the very day which Montuoro said he was fired, counsel heard a conversation between Sanzo and Montuoro in which Montuoro stated that he had not taken the nomination because he did not want it and that he had not been fired.[11] Counsel informed the government of the nature of the conversation and that he wanted that tape available at trial. During cross-examination of Montuoro, the Court was apprised of this tape (374-375) and all the parties agreed that the procedure to be used would be to have Montuoro listen to the tape out of the presence of the jury and then be asked questions about the tape in front of the jury. This was done. In fact, Montuoro testified that he listened to the tape of May 12th and heard himself tell Sanzo: "I didn't leave, I wasn't fired, I am on Workmen's Compensation," and that "I didn't take the nomination for secretary-treasurer because I didn't want it" (384). Montuoro, however, persisted in testifying that he was fired and denied a nomination (385-386). Even further proof of the falsity of this testimony was a letter sent by Montuoro to the Union's Board of Trustees dated July 19, 1978 (368, Defendant's E in evidence). In this letter Montuoro wrote, "When I left your employ on May 8th, I left on compensation. I did not resign and as far as I know, I

[11] Interestingly, another government witness, Joyce Cole, testified that she was present when Montuoro was fired by Sanzo. This is very odd in light of the taped conversation of that night.

was not fired" (368-369). Montuoro verified that the reading of the letter was correct (369).

Not only did the government do nothing to correct this false testimony[12] at the time it was given, it did not even do so when Montuoro was recalled to the stand later in the trial.

In this later testimony, again Montuoro's testimony was less than truthful. In this testimony, Montuoro testified regarding the embezzlement of funds from the Union to pay for an air-conditioning unit for Sanzo's mother (1061). He stated that he had refused to sign the check to Mr. Levine because he was aware of its improper purposes (1060-1061). On cross-examination, Montuoro testified that he never spoke to the air-conditioning service man, Mr. Levine (1067). Yet, he testified that he signed the repair bill because the "service guy said he did the work" (1066).

Mr. Levine, called as a government witness, testified on direct that it was Montuoro who arranged for the purchase of the air conditioner (873) and that it was Montuoro who told him how to make out the bill (875).

Despite the obvious falsity of Montuoro's testimony, the government did nothing to correct it.

Before the Second Circuit, the government took the position that Montuoro's testimony was true. The government's position was based upon an erroneous reading of the record. The government incorrectly asserted that the defense attempted to impeach Montuoro by cross-examination ". . . that he had been fired from his position of secretary-treasurer of Local 29 . . ." This assertion is incorrect. Montuoro was the secretary-treasurer of the

[12]Even if the prior notice of the falsity of Montuoro's testimony is disregarded, when the falsity was established at trial, the government was still obliged to correct it. *United States v. Glover*, 588 F.2d 876 (2d Cir. 1978).

Union, an elected position from which he could not be fired. As regards this Union position, Montuoro claimed that he had been denied renomination. Montuoro had also been a Trustee of the Pension and Welfare Fund of Local 29 and he had the job of assistant administrator (341, 363).

The questioning by defense counsel related to Montuoro's assertion that he had been fired from his assistant administrator position (341, 368, Gov't 3500-45A, p. 12-13, 16, 45). This was the only position from which Montuoro claimed he was fired.[13]

The government's argument then proceeded upon another inaccuracy. The government argued that defense counsel on cross-examination (387) brought out that Montuoro had ". . . been forced to resign" from this position. Gov't brief, p. 24. An examination of the record clearly shows that the questioning of Montuoro to which the government refers relates to Montuoro's position as Trustee of the Pension and Welfare Fund:

> Q. Didn't you resign your position with the Pension and Welfare as a Trustee?
>
> A. I was forced to resign *there.*
>
> Q. But you gave a letter of resignation?
>
> A. I was forced to resign. (387) (emphasis supplied)

In fact, Montuoro had resigned his position as Trustee and had sent a letter of resignation to the Board of Trustees. This resignation, which Montuoro claimed was

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[13]The government had before it (e.g. Gov't 3500-45A the minutes of the hearing on this claim held before the NLRB) ample evidence that Montuoro's claim of dismissal related only to the administrator's position.

forced, was separate from his claim of being fired from the job of assistant administrator.[14]

The Government then argued, from its mistaken belief that Montuoro's claim of forced resignation related to the job from which he claimed he was fired, that "To Montuoro, being forced to resign meant that he was fired, so that his trial testimony was not false on this particular." (Gov't brief, p. 24).

Even if the Government were correct that the "forced resignation" related to the job of assistant administrator, which it does not, that argument still supports Sanzo's position that the testimony of Montuoro was false. If Montuoro equated "forced to resign" with "fired", then when he stated on the phone to Sanzo on May 12th that he had *not* been fired, he included in this statement that he had not been forced to resign.

If there were any doubt left about the falsity of Montuoro's testimony, it is erased by reference to his testimony that at the time he was fired, Sanzo said to him:

> Q. What did Mr. Sanzo say to you when he fired you?
>
> A. He says, you got to take your keys and turn in your card and we don't want you here no more.
>
> Q. That was all?
>
> A. *Case closed.* (370-371) (emphasis supplied).

Yet, when Montuoro made his claim under Workmen's Compensation, he testified at that hearing that he was fired for making a Workmen's Compensation claim (p. 371). That Montuoro divined from Sanzo's sole statement to him to get out, "we don't want you here anymore" that he was fired for making a Compensation claim tells much more about Montuoro's honesty than it does about his telepathic powers.

[14]See Gov't 3500-45A p. 77.

Finally, on July 19, 1978, some months after his being "fired" as assistant administrator, Montuoro actually sent a letter to the Trustees stating:

> When I left your remploy [sic] on May 8, I left on compensation. I did not resign and as far as I know, I was not fired. (368-369).

Yet at the Compensation hearing, Montuoro testified that there was no doubt in his mind that he knew on May 12, that he had been fired (386).

The Second Circuit accepted the convoluted reasoning that Montuoro's statement that he was not fired was a result of confusion (i.e. "forced to resign"). Aside from the fact that the record does not support the position, the Second Circuit was noticeably silent on other false statements of Montuoro that he had been denied nomination as secretary-treasurer. Nowhere did the Second Circuit discuss Montuoro's taped statement that he had not taken the nomination because he had not wanted it.

Anne Stamulis, who worked in the claims department of the Union, initialed the forged dental claims. During cross-examination, she denied that she had forged them. At this point, the government was informed of the report of a handwriting expert[13] and was offered specimens of Stamulis' handwriting. Further, counsel requested that the government run its own handwriting test to verify or refute it. The Court stated that the government was under no obligation to do so and they refused (335).

These specimens of Stamulis' handwriting and the forged dental claims are set out in the appendix (16a).

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[13]Mr. Frangipani's credibility was severely damaged by the government's questions about his credentials.

They speak for themselves.[16]

Joseph Cippolone testified that on a Friday night, sometime after October 21, 1977 (721), the date on the check in question (Gov't 67), Sanzo asked him to cash a check.

Originally, Cippolone refused because he was in the middle of sorting out a problem with Trainello and did not want to cash a check with Trainello's signature (546-548). However, the next day at a baseball game he agreed to cash the check for Sanzo (548-49). On cross-examination, Cippolone testified that this baseball game was a sandlot game in which his son played and that the coach of that team was Dominick Fasulo (phonetic) (719). Cippolone went on to testify that he gave the check to his wife who deposited it. She subsequently took out a check for $5,000 made out to Cipico which was deposited in Cipico's account (725). Sanzo was paid with $5,000 that was kept in Cippolone's house (725). This version of how the money got to Sanzo was contradicted by earlier versions given by Cippolone to agents and in the Grand Jury (728-729, 731). Further in an EBT given in Cippolone's civil case against Trainello, he denied that he had ever cashed a check for Sanzo (736).[17]

On the defendant's case, Dominick Falsiglia, the coach of Cippolone's son's team, testified that no baseball game in that sandlot league was played after the end of August and certainly none after September 15, 1977, a full month prior to the date set by Cippolone (1406-1407).

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[16]Counsel suggests that the Court compare the F's, N's, L's the 2's, 5's, and 6's. It should also be remembered that Stamulis worked in the claims department.

[17]At this point, the Court asked Cippolone, "He wants to know if you lied in 1978 and you are telling the truth today or did you tell the truth in 1978 and you are lying today?" (745).

No wonder, that Cippolone's memory got progressively worse as the questions became more difficult (704-705, 715, 735-736).

The Second Circuit's decision regarding the asserted false testimony states that, at most, the government's use of false testimony was negligent. The Circuit then rejected "negligence" as a proper basis for finding a violation of due process. In so doing, the panel stated that the cases cited by Sanzo did not support his position.

In *Welcome v. Vincent*, 418 F.Supp. 1088, 1093 (S.D.N.Y. 1976) rev'd on other grounds 549 F.2d 853 (2d Cir.) *cert. denied*, 432 U.S. 911 (1977) Judge Weinfeld states that "the deliberate, knowing, or even negligent use of false testimony by the prosecution" may entitle a defendant to a new trial. The Circuit rejected this statement as dicta, yet cited no cases rejecting such a standard. In fact, the Circuit created new law.

It is Sanzo's position that there is good reason for imposing such a standard. Negligence is far from the mere use of false testimony of persons of doubtful character. No one is asserting that mere use should be considered a due process violation.

However, where, as here, there were ample indications of at least, Montuoro's and Cipollone's false testimony in material in the possession of the government before trial, negligently using such evidence should be a due process violation.

The standard used to determine whether the use of false testimony requires a new trial is:

> "the falsity could . . . in any reasonable likelihood have affected the judgment of the jury [or if] the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial. *United States ex rel. Washington v. Vincent*, 525 F.2d 262, 267 (quoting *Napue v. Illinois*, 360 U.S. 264 at 271-72; 1959).

The Circuit also indicated that Montuoro's testimony, which is at issue, was collateral and therefore harmless. This is not correct. Montuoro was an opponent of Sanzo in Union elections. The prior false charges of Sanzo's firing him and denying him a nomination were alleged to be part of Montuoro's plan to take over the Union. The charges about which Montuoro testified were asserted to be part of this overall scheme of Montuoro. Thus, the falsity of his prior accusations of Sanzo were not collateral, but went directly to his bias, hostility and motive to lie.

As to Cipollone's testimony, it went directly to the alleged check cashing and cannot be characterized as collateral. Sanzo was convicted of the count about which Cipollone testified.

Thus, it is clear that, at the least, the government negligently used false testimony which was material to the charges of which Sanzo was convicted. As such, this false testimony could reasonably have affected the jury's judgment. Accordingly, the writ should be granted.

POINT II

THE ADMISSION INTO EVIDENCE OF TESTIMONY RELATING TO ORGANIZED CRIME DENIED SANZO A FAIR TRIAL.

During the government's case, it was brought out that Ralph Trainello had caused a meeting involving Sam Cavalieri, Sr., Trainello, Sanzo and Joseph Cippolone. At this meeting, held at Cavalieri's social club, Trainello asserted that he had made pay-offs to Sanzo because Sanzo, using Cavalieri's name as a threat, had threatened his and his family's life. Cavalieri seemed upset and surprised at this revelation and denied that he had been any part of

these threats. Cavalieri reassured Trainello that there would be no further threats made.[18]

Vigorous objections both as to admissibility of this testimony and its prejudicial effect were made. The court overruled the objections and permitted the testimony to come in.

During this line of inquiry, the court granted Trainello's motion for a severance (629) but the case against Sanzo continued.

Thus, the jury was permitted to hear evidence about a sit-down with a person, Sam Cavalieri, involving threats and with organized crime overtones. This was so, despite the fact that Cavalieri was not a co-defendant or even an unindicted co-conspirator in the case. Also, the government offered no proof as to who Cavalieri was, but instead, relied upon this cloud of organized crime.

Later in the trial, Joyce Cole, a secretary for the Union was permitted to testify, again over objection, that Sanzo called Sam Cavalieri, "Big Sam", that Cavalieri called the Union using an assumed name, and that Sanzo had told her that Cavalieri was his boss (902-905).

The government offered no direct evidence of who Cavalieri was. Again, the prosecution was satisfied to merely have Cavalieri's name mentioned.

In its summation, the government stressed that Trainello's statements to Cavalieri about the payments to Sanzo gained credibility because they were made to Cavalieri (1596-1597, 1683).

The government, in its reply to Sanzo's assertion that evidence relating to a meeting with Sam Cavalieri, Sr. and other evidence relating to Sam Cavalieri, Sr. improperly injected a cloud of organized crime into the trial, lumped two separate circumstances together.

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[18](551-556, 642-644).

The government lumped the testimony relating to Trainello's claim of payments made under threats with evidence relating to Sam Cavalieri, Sr. Even if the self-serving hearsay declaration of Trainello regarding the alleged pay-offs and the reasons for them were admissible,[19] this has nothing to do with the evidence relating to Cavalieri. It was a government witness, Joseph Cipollone, who directly testified about this meeting with Cavalieri. Further, Joyce Cole testified about Sanzo's statements, about Cavalieri calling the Union under an assumed name, his nickname of "Big Sam", and that Cavalieri was the "boss" of the Union (902-905; Gov't brief, p. 39).

None of this had anything to do with the issues on trial, which were whether Trainello had made payments to Sanzo and whether Sanzo had embezzled an air-conditioner and taken a $500.00 bribe.

The government conceded that it offered no evidence to prove who Cavalieri was. (Gov't brief, p. 40). From this it argued that "Big Sam" could have been anyone; "a blues singer, a jazz musician . . ." (Gov't brief, p. 41). In the face of the record this assertion is astounding. The record shows that the jury had before it evidence that Cavalieri was one whose name could be used to frighten people into making payments, that he held sit-downs at his social clubs, and that he was the real boss of the Union. This profile is not consistent with a "blues singer" or a "jazz musician".

As to the Second Circuit's decision, beginning in its statement of facts, the Second Circuit's opinion is misleading as to the nature of the organized crime

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[19]In light of the re-direct examination of Trainello by the government, Sanzo takes the position that the jury probably did not believe Trainello's story of threats.

evidence introduced at trial. In the statement of facts, the panel states:

> Sometime in January or February, 1978, *according* to Joseph Cipolione, Sanzo asked him to attend a meeting with Samuel "Big Sam" Cavalieri, whom Sanzo considered to be his "boss" and whose son was the administrator of Local 29's pension fund. *United States v. Sanzo, supra.* p. 1623. (emphasis supplied).

The clear impression given by this statement was that Cipollone was the source of all this evidence. The Second Circuit's decision, indeed, treats this issue as if that were the case. But it is not.

Aside from Cipollone's testimony about this meeting with Sanzo, Trainello, and Cavalieri, it was Joyce Cole's testimony[20] which was to the effect that Sanzo considered Cavalieri to be the boss of the Union and whose son was administrator of the Union, and of Cavalieri's contact by phone with the Union.

In conclusion, the testimony relating to the meeting with Sam Cavalieri and the testimony about Cavalieri's contact with the Union, were not probative of the issues at trial and were very prejudicial. Therefore, the trial court erred in admitting this testimony, and denied Sanzo a fair trial. F.R. Ev., Rule 403; see, *United States v. Robinson,* 544 F.2d 611 (2d Cir. 1976) reh. 560 F.2d 507, *cert. den.* 435 U.S. 905; *United States v. Bell,* 573 F.2d 1040 (8th Cir. 1978).

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[20]Cipollone's testimony in no way indicated that Sanzo thought of Cavalieri as his "boss". Rather, it was the alleged use of Cavalieri's name to threaten Trainello which brought Cavalieri into the picture. Even the government conceded at trial that these allegations of threats by Sanzo were lies.

POINT III

THE EVIDENCE OF CONSPIRACY TO DEFRAUD THE UNITED STATES OF TAX REVENUES WAS INSUFFICIENT TO SUPPORT THE CONVICTION.

Sanzo was convicted, under Count 4 of the indictment, of conspiring with Ralph Trainello and others to defraud the United States out of tax revenues.

The proof at trial, at most, established that Sanzo received payments which violated the Taft-Hartley Act, from Aberdeen Associates in the form of checks made out to cash and signed by Ralph Trainello, the President of Aberdeen. Further, that Aberdeen caused these payments to be carried on the Aberdeen books as various business expenses to which the payments did not really relate.

In order to test the sufficiency of the proof at trial, the evidence must be viewed in the light most favorable to the government. *United States v. Moten,* 564 F.2d 620 (2d Cir. 1977), *United States v. Taylor,* 562 F.2d 1345 (2d Cir. 1977) *Glasser v. United States,* 315 U.S. 60, 80 (1942). Even in such light, the evidence is insufficient to uphold this conviction.

The standard to be applied in determining the sufficiency of the evidence is:

> "[W]hether upon the evidence taken as a whole, a reasonable mind might fairly conclude that the defendant was guilty beyond a reasonable doubt." *United States v. Wiley,* 519 F.2d 1348, 1349 (2d Cir. 1975) *cert den. sub nom. James v. United States,* 423 U.S. 1058 (1976).

As has been often stated, "the gist of the offense [of conspiracy] remains the agreement, and is therefore essential to determine what kind of agreement or understanding

existed as to each defendant." *United States v. Taylor,* 562 F.2d 1345, 1352 (2d Cir. 1977), quoting from *United States v. Borelli,* 336 F.2d 376, 384 (2d Cir. 1964) *cert. den.,* 379 U.S. 960 (1965).

In conspiracy prosecutions, two different types of intent are generally required: basic intent to agree, which is necessary to establish the conspiracy, and an intent to effectuate the object of the conspiracy. *United States v. U.S. Gypsum Co.,* 438 U.S. 422 (1978).

It is correct, that proof of agreement, the requisite intent and participation need not be proved directly but can be established circumstantially, *United States v. Gibbons,* 602 F.2d 1044 (2d Cir. 1979) *cert. denied* 444 U.S. 950; *United States v. Marchisio,* 344 F.2d 653 (2d Cir. 1965); *Delli Paoli v. United States,* 352 U.S. 232 (1957); *Glasser v. United States,* 315 U.S. 60 (1942), and a common purpose and plan may be inferred from the development and circumstances shown by the evidence. *United States v. Glasser, supra.*

At trial, the government contended that sufficient proof of an agreement, the requisite intent, and participation could be inferred from the bare acts of concealment (i.e. Sanzo's failure to report this income and Aberdeen's and RNT's false entries) of the underlying conspiracy to violate the Taft-Hartley Act.

This Court has stated, albeit in the context of determining when the statute of limitations begins to run, that:

> The crucial teaching of Krulewich and Lutwak is that after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment. *Grunewald v. United States,* 353 U.S. 391, 402 (1957).

The Supreme Court addressed itself directly to the issue of whether the mere act of concealment can be used to infer that there existed from the beginning an actual agreement to conceal:

> . . . a conspiracy to conceal is being implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment. There is not a shred of direct evidence in this record to show anything like an express original agreement among the conspirators to continue to act in concert to cover up, for their own self-protection, traces of the crime after its commission. 353 U.S. at 403.

Here, also, there is not a shred of direct evidence that Sanzo and Aberdeen, RNT, or Trainello ever agreed to conceal these payments as part of the original conspiracy. Nor is there a shred of evidence that Sanzo, Aberdeen, RNT or Trainello did not act independently regarding their cover-up. This is so, despite the fact that Trainello was called as a government witness after being granted immunity. Trainello was asked only if he made payments[21] to Sanzo in violation of Taft-Hartley. The government did not even ask him whether he had agreed with Sanzo to falsely report these payments, nor if he agreed with Sanzo that Sanzo would not report his income.

Further, the acts of concealment[22] were made many months after the payments (e.g. when Sanzo filed his tax returns) and there is no proof whatsoever that Sanzo and

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[21]Trainello's testimony was that these payments were made under threats against his and his family's lives.

[22]Sanzo was acquitted of the charge of obstructing justice, Count 5.

anyone else agreed or in any other way discussed how or whether these payments would be reported.

Acts of concealment can be of significance in furthering a criminal conspiracy, *United States v. Davis,* 623 F.2d 188 (1st Cir. 1980), but not, as here, where the acts are done after the central objectives have been attained and only to cover up the crime.

The Second Circuit's decision that the evidence of conspiracy and the reasons stated for that decision do not follow this Court's cases on point.

The panel's decision is based upon the following speculations, which even if accepted do not make out agreement, the gist of any conspiracy.

The panel states:

> . . . Trainello knew that Sanzo was unlikely to report as income large sums of laundered money, and that Sanzo equally knew that Trainello would have to assign on his books some legitimate purpose for the payments that could form the basis for a tax deduction. *United States v. Sanzo,* slip op. March 10, 1982, P. 1627.
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> ***
>
> The false Aberdeen book entries assisted Sanzo in failing to disclose income on his own returns, while Sanzo's omission of Aberdeen-RNT income on his returns enabled Aberdeen to claim expense deductions to which it was not entitled, i.e., for payoffs in violation of the Taft-Hartley Act. The result was substantial tax evasion by Sanzo and Aberdeen. *Id* at p. 1628.

Even if these speculations are accepted, knowledge by Sanzo that Trainello would make false entries and Trainello's that Sanzo would not report his income is far from showing any agreement to do so. Here, knowledge of another's acts does not constitute an agreement to commit those acts.

So too, the mere fact that the acts of each party aided one another does not establish agreement. There are innumerable individual acts which aid another without agreement.[23]

In short, the proof at trial, at most, showed independent acts of concealment. Even if they were mutual acts, which they were not:

> Actof covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators. For every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And, again, every conspiracy will inevitably be followed by actions taken to cover the conspirators traces. *Grunewald v. United States,* 353 U.S. 391, 402 (1957).

In conclusion, the evidence at trial showed only an agreement to make and accept payments. There was no proof that Sanzo's failure to report or Aberdeen or RNT's false entries were part of any agreement between them. Thus, the evidence at trial was insufficient to convict Sanzo of the conspiracy charge.

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[23]As to the alleged pay-off of $115,000 to Trainello, Sanzo was acquitted of this count.

CONCLUSION

THE WRIT SHOULD BE GRANTED.

Respectfully submitted,

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